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IN THE

SUPREME COURT

OF THE UNITED STATES

RICHARD C. RÔLES,

Petitioner

vs.

HUGH EARLE, COLLECTOR OF INTERNAL REVENUE for the DISTRICT OF OREGON, and THE UNITED STATES OF AMERICA,

Respondent

BRIEF IN SUPPORT OF WRIT OF CERTIORARI

JURISDICTION

Jurisdiction of this Court is based on Title 28, Section 1254 (1) USCA (June 25, 1948, C 646 § 1, 62 Stat, 928), as follows:

> "Cases in courts of appeals may be reviewed by the following methods:

(1) By writ of certiorari granted upon the petition of any part to any civil or criminal case before or after rendition of judgment or Decree;"

STATEMENT OF THE CASE

Plaintiff brought an action in the District Court of the District of Oregon against Hugh Earle, Collector of Internal Revenue, and the United States of America for recovery of $24,365.17, which he alleged was erroneously assessed and collected. (R. 3)

Plaintiff filed a written request for trial by jury of all issues triable by jury. (R. 30)

The issues were stipulated and a jury trial was had resulting in a verdict for plaintiff on special findings, as to plaintiff's total claim. (R. 37)

The court erroneously severed plaintiff's claim holding that $18,111.37 of plaintiff's claim was a claim against the United States as to which plaintiff did not have the right to trial by jury. (R. 50)

As to this part of plaintiff's claim, the court held that it was in excess of $10,000.00 and was collected by a former collector and hence was a

claim against the United States and not against the defendant Collector, and therefore not triable by a jury.

The court having overruled motion for new trial and judgment non obstante verdicto announced that it would determine the facts contrary to the jury verdict as to the portion of plaintiff's claim it held to be against the United States and ordered findings of fact and conclusions of law to be prepared. (R. 50)

Plaintiff moved to withhold findings, conclusions and judgment on the ground, inter alia, that the court did not have jurisdiction as it was not a claim against the United States, and moved for judgment in favor of plaintiff and against the Collector on the jury verdict. (R. 51 and 191)

This motion was denied and findings and conclusions were entered. (Tr. R. p. 52 and 195)

Plaintiff moved to vacate the same on the grounds previously urged. (R. 61)

The motion was denied. (R. 63)

Plaintiff then petitioned the United States Court of Appeals for the 9th Circuit for leave to file a petition for writ of mandamus to compel entry of judgment which petition was denied on the ground that plaintiff had an adequate remedy by appeal. *Roles v. Solomon,* Misc. No. 210 US Ct. of Appeals for Ninth Circuit, June 8, 1951.

Thereafter, plaintiff appealed from the judgment of dismissal in favor of the United States pointing out that the judgment of dismissal as to the United States was proper for lack of jurisdiction, but was improper on findings of fact and conclusions of law, since the court did not have jurisdiction to determine the matter as a claim against the the United States. (R. 70)

The appellate court entered its opinion in which it held that the trial court did not have jurisdiction to determine the matter as a claim against the United States, but held it had no jurisdiction to do more than affirm the judgment of dismissal as to the United States, and that it had no jurisdiction to reverse or remand to the lower court or to enter judgment against the collector although the complete record was before it.

Plaintiff moved for rehearing claiming the Court had jurisdiction and was required to reverse where the judgment appealed from was on the merits and where it affirmed a void judgment as to part of plaintiff's claim adversely to plaintiff it deprived plaintiff of the right to trial by jury which he had demanded. (R218 order denying)

ARGUMENT

1. WAS THE COURT OF APPEALS REQUIRED TO REVERSE A JUDGMENT WHICH DETERMINED A PART OF PLAINTIFF'S CLAIM, WHERE THE APPELLATE COURT HELD THAT THE TRIAL COURT HAD NO JURISDICTION TO DETERMINE THAT PORTION OF PLAINTIFF'S CLAIM ON THE MERITS, AND DID THE APPELLATE COURT HAVE JURISDICTION TO ENTER THE PROPER JUDGMENT OR TO ORDER THE LOWER COURT TO ENTER THE PROPER JUDGMENT ON THE JURY VERDICT WHEN THE COMPLETE RECORD WAS BEFORE IT, PARTICULARLY WHERE THE DISTINCTION BETWEEN THE COLLECTOR OF INTERNAL REVENUE AND THE UNITED STATES IS PURELY FICTIONAL?

The refusal to reverse and to enter a proper decree is a novel departure from accustomed procedure. Petitioner finds no authority which is factually identical.

Petitioner contends that the appellate court's holding decided a Federal question of procedure in conflict with the decisions of this court, and that the appellate court has in this respect so far departed from normal judicial proceedings as to call for this court's powers of supervision.

We shall first call attention to the jurisdictional statute relating to appellate courts:

Title 28, Section 2106, USC provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree or order or require such further proceedings to be had as may be just under the circumstances."

Thus the court by statute, has the jurisdiction to remand with directions for entry of proper judgment or for further proceedings unless the judg-

ment appealed from is not "lawfully brought before it for review" as provided by statute.

There would seem to be little doubt of the fact that the judgment appealed from was lawfully before the court and that each matter determined by the judgment was likewise before the court.

The judgment appealed from was a dismissal as to the United States but it was also a determination of $18,111.37 of plaintiff's claim on the merits.

> "It has been held that the appellate court will so far take cognizance of the void entry AS TO REVERSE IT and restore the parties to the position they originally occupied."
>
> 2 Am. Jur. 870 Sect. 36, citing *Alexander v. Crollot,* 199 U. S. 580; *Baker vs. Power,* 124 U. S. 167, *Wilson vs. Daniel,* 3 U. S. 401.

Plaintiff requested in his reply brief on appeal.

> "The judgment appealed from should be reversed." (R. . .) not included in record

And again in plaintiff's brief on petition for rehearing.

> "The judgment should be reversed with directions." (R. . .) not included in record.

The court refused to reverse or direct.

It should also be noted that plaintiff moved to vacate the void judgment of March 26, 1951 (R. 61) and that this motion was denied and that plaintiff appealed from that order as well as from the void judgment, (R. 70) but still the appellate court has refused to reverse, (R. . .), although it has recognized that the March 26, 1951, judgment is void as a determination of the merits of a portion of plaintiff's claim.

Where the court severs the claim of plaintiff into two separate causes of action, then each of those separate causes should be treated as though separate actions were filed as to each cause.

Thus when the causes were split, plaintiff filed a cause of action against the collector and the United States for $6253.81 and filed a cause of action against the collector and the United States for $18,111.37, (making plaintiff's total claim of $24,365.11).

When thus properly analyzed the judgment entered on January 2, 1951, in favor of plaintiff and against the collector for $6253.81 was a holding that the United States was not responsible for that

amount and the collector was both liable and responsible therefor. This was a correct determination from which no appeal would lie.

On the other hand when a judgment was entered in favor of the United States and findings and conclusions were entered on March 26, 1951, holding that the United States was responsible but not liable it was a determination that the collector was neither responsible nor liable, although the exact reverse was true.

When plaintiff appealed from the March 26, 1951, judgment both the collector and the United States were named in the notice of appeal and made parties thereto. When the appellate court determined that the plaintiff's claim was against the collector instead of the United States, it was then required to reverse for further determination of plaintiff's claim against the collector as to the $18,111.37 since he was a party to the severed cause of action.

In this connection, we call the court's attention to the fact that this court has held that except where required by statute the distinction between the col-

lector and the United States is purely fictional and should not be set up as a defense to deprive plaintiff of his statutory and constitutional right to trial by jury. The court of appeals has by its opinion held contrary to the case of *Moore Ice Cream Co. vs. Rose,* 289 U. S. 373.

If the cause was not reversed, plaintiff would be deprived of his constitutional right of trial by jury when he had demanded the same and he would also be deprived of his right to review since there would be no judgment of any kind as to his claim of $18,111.37 from which plaintiff could appeal.

> "A party aggrieved by a judgment cannot be deprived of a right of review given him by statutory or constitutional provision by any act or restriction of the court." 3 Am. Jur. 919, Sec. 201.

It will thus be seen that the court had the judgment of March 26 properly before it for consideration under the jurisdictional statute and the judgment of January 2, 1951 was not necessary or even incidental to its reversal of the judgment appealed from.

2 (a) DID THE COURT OF APPEALS HAVE THE RIGHT TO DETERMINE THE EFFECT AND INTENT OF A JUDGMENT NOT BROUGHT BEFORE IT FOR REVIEW.

Where the record is complete and is before the court the court may order the entry of a proper judgment of its own motion or may reverse with directions to enter the proper judgment. (*Wabash Rwy. Co. vs. Public Service Comm.*, 273 US 47; *Green vs. Obergfell*, 121 F. 2d 46, 73 App. D.C. 298.)

However, the Court of Appeals has held that the judgment of January 2, 1951 was not before it and plaintiff points out that if the judgment was not properly before the appellate court, it would have no jurisdiction to interpret its effect or intent and would have no jurisdiction to determine its finality.

2. (b) WAS THE JUDGMENT OF JANUARY 2, 1951, IF PROPERLY BEFORE THE APPELLATE COURT, A FINAL JUDGMENT FROM WHICH PLAINTIFF COULD APPEAL, ABSENT A DETERMINATION BY THE COURT THAT THERE WAS NO JUST REASON FOR DELAY AND NO EX-

PRESS DETERMINATION FOR ENTRY OF JUDGMENT UNDER RULE 54 B OF THE RULES OF CIVIL PROCEDURE.

Petitioner particularly calls this Court's attention to the error in which it is believed the court of appeals has fallen.

The Circuit Court has in effect based its determination of the controversy between the parties on the January 2nd judgment and has thus failed to make a complete determination of plaintiff's entire claim or controversy.

The question of finality of a judgment under Rule 54B, Rules of Civil Procedure is not dependent *on the parties concluded by that judgment* as the Court of Appeals indicates, but is entirely dependent on whether plaintiff's entire claim has been completely determined and adjudicated.

The court of appeals for the second circuit in considering the question in the case of *Clark vs. Taylor*, 163 F2d. 940 had this to say:

> "A transaction or occurrence is the subject matter of the claim rather than the legal rights arising therefrom; additions to or subtractions

from the central core of fact do not change the substantial identity so as to support piece meal appeals."

See also *Republic of China vs. American Express Co.*, 190 F. 2d 334.

In the present case if the second judgment of March 26, 1951 is void as the Court of Appeals holds that it is; and if plaintiff has a claim of $18,111.37 against the collector which the trial court erroneously determined to be a claim against the United States as the Court of Appeals agree that he has; and if the judgment of January 2, 1951 was a final judgment as to the collector's liability as the court of appeals holds it to be, then what happened to plaintiff's claim of $18,111.37? It can not have vanished into the heavens for the parties stipulated the amounts.

Can it be that plaintiff can have a claim stipulated as to amount ($24,365.17); brought against the proper party (the collector) and held to be properly so brought by the appellate court; have a jury verdict in his favor as to the erroneous collection thereof, and yet be deprived of $18,111.37 of that same claim?

The Court of Appeals has apparently held this to be proper because they say plaintiff should have appealed from the judgment of January 2, 1951, yet that same Court agrees that plaintiff has an additional claim for $18,111.37 which is not determined by that judgment but at the same time holds that the judgment for $6253.81 was a final judgment.

We can not under any theory find any method of harmonizing this view where it is the disposition of plaintiff's entire claim which determines finality and not the liability of any one party.

If the lower court had intended the judgment for $6253.81 to be a final determination of plaintiff's claim, then how could it have entered findings of fact as to the balance of plaintiff's claim in favor of the United States as to the $18,111.37 amount?

CONCLUSION

Plaintiff submits:

1. The Court of Appeals has failed to follow this court's holding in the case of *Moore Ice Cream Co. v. Rose,* supra, where this Court has held the distinction between the Collector and the United

States is pure fiction in tax refund matters.

2. The Court of Appeals has construed the effect of a judgment not before it on appeal, but additionally has construed such judgment to be appealable as a final judgment when it could not under any theory, be final as a disposition of plaintiff's entire claim, thus holding directly in conflict with the decisions of other circuits.

3. The Court of appeals has rendered a decision on a Federal question of procedure in conflict with this Court's decision where this court has held that where the entire record is before the appellate court, it should take such action as is proper in respect thereto rather than to send the case back to the trial court. In this case, the Court of Appeals has refused to either enter the proper order or send the cause back for a further determination.

4. The Court of Appeals has thus departed from the accepted and usual course of judicial procedure and has sanctioned a departure from the accepted procedure by the lower court in permitting the lower court to split plaintiff's cause of action (er-

roneously) for the purpose of deciding a factual question by the court contrary to the jury verdict and without jurisdiction so to do.

Certiorari should issue to the Court of Appeals for the Ninth Circuit in order that the matter may receive a full determination by this Court resolving the procedure.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 72

R. C. ROLES, PETITIONER

v.

HUGH EARLE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF OREGON, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Court of Appeals (R. 210-217) is reported at 195 F. 2d 346.

JURISDICTION

The judgment (R. 217-218) of the Court of Appeals was entered March 24, 1952. The order denying petition for rehearing was entered April 15, 1952. (R. 218.) The petition for certiorari

was filed May 19, 1952. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. The District Court entered two separate judgments herein: one against the Collector and one in favor of the United States. Did the Court of Appeals, upon petitioner's appeal from the judgment in favor of the United States, have jurisdiction to review the judgment in favor of the petitioner against the Collector, from which no appeal was taken?

2. Did petitioner's appeal from the denial of his motion to set aside the judgment in favor of the United States and to increase the prior judgment in his favor against the Collector, give the Court of Appeals jurisdiction to review the judgment against the Collector, although no appeal from that judgment had been taken?

3. Even if the Court of Appeals had jurisdiction upon such appeal to review the judgment against the Collector, did the District Court have jurisdiction of a suit against the Collector for an amount paid over to a former Collector to be held in a suspense account which was applied by the Commissioner to the petitioner's liability for taxes after the present Collector had entered office?

STATUTE INVOLVED

28 U.S.C.:

§ 1340. *Internal revenue; customs duties*

The district courts shall have original jurisdiction of any civil action arising under any

Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

§ 1346 [As amended by Section 80, Act of May 24, 1949, c. 139, 63 Stat. 89]. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws, (i) if the claim does not exceed $10,000 or (ii) even if the claim exceeds $10,000 if the collector of internal revenue by whom such tax, penalty or sum was collected is dead or is not in office as collector of internal revenue when such action is commenced;

* * * * *

§ 2402. *Jury trial denied in actions against United States*

Any action against the United States under section 1346 of this title shall be tried by the court without a jury.

STATEMENT

This is a suit brought in a Federal District Court to recover income taxes for the years 1944, 1945 and 1946, allegedly overpaid in the total sum of $24,365.18. It was instituted against both Hugh Earle, Collector of Internal Revenue for the District of Oregon, and the United States of America. (R. 3-27.) After issue was duly joined by answer (R. 27-30), petitioner filed a demand for trial by jury of the issues joined (the *bona fides* of two alleged partnerships), under Rule 38 of the Federal Rules of Civil Procedure.

The pre-trial order (R. 31-37) filed herein shows that among other things the following matters were admitted: That the Collector Earle, to whom $6,253.81 of the tax sought to be recovered was paid, was at the time of payment of the sum and now is the duly acting Collector of Internal Revenue; that the Collector of Internal Revenue to whom $18,111.37 of the tax sought to be recovered was paid was at the time of the commencement of this action not in office; that this sum was paid to the former Collector for holding in suspense and without application to tax liability (R. 31-32); and that thereafter, on February 16, 1949, the sum was applied by the Commissioner against additional taxes assessed against the petitioner (R. 32-33). In the pre-trial order the parties agreed to have the case tried before the court without a jury as to the claim against the United States. (R. 36.)[1]

[1] This was necessary because of 28 U.S.C., Section 2402, which provides that any action against the United States for the recovery of any internal revenue tax brought under Section 1346 of that title shall be tried by the court without a jury.

The case was tried to the jury as to the claim against the Collector Earle. The jury rendered a special verdict against the Collector, and on January 2, 1951, the District Court entered judgment on the verdict for the petitioner and against the Collector Earle in the sum of $6,253.81, with interest. (R. 39-41.) The petitioner has not appealed from this judgment.

The claim for refund of the balance, $18,111.37, which petitioner had paid in the manner above stated to the Collector who was not in office at the time the action was commenced, was at that time, and at the time of the trial, regarded by the parties, as well as by the District Court, as a claim against the United States, and was tried to the court without a jury pursuant to stipulation (R. 197-198), and the pre-trial order entered thereon (R. 36). The petitioner submitted proposed findings of fact in connection with his case against the United States (R. 192), and moved for judgment in his favor and against the United States, "as prayed for in plaintiff's complaint and as shown by the pre-trial order on file herein" (R. 38).

On March 22, 1951, petitioner filed a motion to withhold proposed findings of fact and conclusions of law submitted by the United States and to withhold judgment thereon and to enter judgment in petitioner's favor against the United States. (R. 51-52.) The motion was orally denied (R. 194), and thereupon on March 26, 1951, the court made findings and entered judgment against petitioner and in favor of the United States (R. 60-61).

Thereafter the petitioner filed a motion to set aside these findings and judgment and for the entry of a judgment in favor of the petitioner against the Collector Earle in the sum of $18,111.37 on the ground that the court did not have jurisdiction to hear any claim against the United States. (R. 61-62.) The motion was denied April 9, 1951. (R. 63-64.)

Petitioner filed a notice of appeal from the judgment entered on March 26, 1951; from the order of March 26, 1951, overruling his motion for entry of judgment in favor of the petitioner and ordering entry of judgment in favor of the United States and overruling his objections and findings of fact and conclusions of law; and from the order entered April 9, 1951, overruling petitioner's motion to enter judgment in his favor and to set aside the judgment in favor of the United States. (R. 70-71.)

The Court of Appeals held that since the petitioner's notice of appeal made no mention of the judgment of the District Court of January 2, 1951, against Collector Earle, it was apparent that it was without jurisdiction to consider that judgment; that the only judgment brought before it for review was that entered by the District Court on March 26, 1951, dismissing the action against the United States on the merits (R. 212); and further, that petitioner's appeal from the order overruling his motion to set aside the March 26, 1951, judgment and to enter judgment in his favor for the full amount against the Collector had no such force and

effect as to cause the judgment of January 2, 1951, to merge with the March 26, 1951, judgment for purposes of appeal. (R. 213.) The Court of Appeals concluded that, since the petitioner had abandoned his original contention before the District Court that that court had jurisdiction to enter a judgment in his favor against the United States for $18,111.37, it would perhaps be justified in affirming the March 26, 1951, judgment on that ground. (R. 213.) However, the Court of Appeals deemed it advisable to decide for itself whether the District Court had jurisdiction against the United States in this action under 28 U.S.C., Section 1346(a)(1). (R. 213-214.) After holding that the trial court had no jurisdiction to entertain the action against the United States, it affirmed the judgment of dismissal entered March 26, 1951, on that ground. (R. 217.) [2]

ARGUMENT

I

The theory of the taxpayer's single action against Collector Earle, then in office, and the United States was that recovery could be had against the Collector

---

[2] We desire to call to the attention of the Court an error in the record which we believe will not be disputed by the petitioner. As a result of an obvious mistake, the opinion of United States District Judge Gus J. Soloman in another case, wholly unrelated to the instant one, was printed in the record and should therefore be disregarded here. The opinion referred to is set out on pp. 64-70, inclusive, starting below the line in the center of p. 64 and ending above the line in the center of p. 70.

of so much of the income taxes in question as had been paid to him, namely $6,253.81, and against the United States of the balance of $18,111.37, which had been collected by the prior Collector, Maloney. See *Powell* v. *United States,* 123 F. 2d 472 (C.A. 9th), wherein it was held that a Collector and the United States may be joined in one action for the recovery of taxes, but that a separate judgment should be entered against each. In any event, petitioner's demand for a jury trial required a severance. See 28 U.S.C., Section 2402, *supra,* p. 3, which provides that any action against the United States under 28 U.S.C., Section 1346, *supra,* p. 3 (a suit in a District Court for the recovery of any internal revenue tax) shall be tried by the court without a jury. Hence, it was agreed at the pre-trial conference to have the case tried before the court sitting without a jury as to the claim against the United States. This effected a severance into two separate and distinct causes of action—one against the Collector and the other against the United States. The action against the Collector is an action against him personally in the nature of a common law action for money had and received (*Sage* v. *United States,* 250 U.S. 33; *Smietanka* v. *Indiana Steel Co.,* 257 U.S. 1; *Union Trust Co.* v. *Wardell,* 258 U.S. 537; *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 430; *Tait* v. *Western Md. Ry. Co.,* 289 U.S. 620), which may be brought in the District Court of the United States under 28 U.S.C., Section 1340, *supra,* pp. 2-3, and is triable to a jury. On the other hand, the action against the United

States is purely statutory, being authorized by 28 U.S.C., Section 1346(a)(1), *supra*, p. 3, Section 2402, *supra*, p. 3, providing, as stated, that it shall be tried by the court without a jury.

After severance, judgment was entered against the Collector upon a special verdict of a jury on January 2, 1951. The petitioner has never appealed from this judgment. His notice of appeal was limited to the judgment of March 26, 1951, and motions filed in connection therewith, yet what petitioner now seeks is an increase in the amount of the judgment against the Collector. The Court of Appeals was clearly correct in holding that the appeal from the judgment dismissing the action against the United States did not bring before it for review the judgment against the Collector.

II

A long line of cases supports the further holding of the Court of Appeals that the petitioner's appeal from the order overruling his motion to set aside the judgment in favor of the United States and to enter judgment for the full amount in suit against the Collector did not serve to bring the judgment against the Collector before it. *Donovan* v. *Jeffcott*, 147 F. 2d 198 (C.A. 9th); *Republic Supply Co. of California* v. *Richfield Oil Co.*, 74 F. 2d 909 (C.A. 9th); *Armstrong* v. *New La Paz Gold Mining Co.*, 107 F. 2d 453, 454 (C.A. 9th); *Nealon* v. *Hill*, 149 F. 2d 883, 885 (C.A. 9th), certiorari denied, 326 U.S. 753; *Bowers* v. *E. J. Rose Mfg. Co.*, 149 F. 2d 612 (C.A. 9th); *Hicks* v. *Bekins*

Moving & Storage Co., 115 F. 2d 406, 409 (C.A. 9th); *Libby, McNeill & Libby* v. *Malmskold,* 115 F. 2d 786 (C.A. 9th). See also *Ford Motor Co.* v. *Busam Motor Sales,* 185 F. 2d 531, 533-534 (C.A. 6th), and particularly *Bass* v. *Baltimore & O. Terminal R. Co.,* 142 F. 2d 779, 780 (C.A. 7th), where that court said that it must of its own motion notice the fact that there was no appeal from the judgment in the case, the appeal being only from the order of the court denying appellant's motion for a new trial, which was not subject to appeal, though reviewable for error of law on appeal from the final judgment. To the same effect is *Mosier* v. *Federal Reserve Bank of New York,* 132 F. 2d 710, 712 (C.A. 2d). In *United States* v. *Muschany,* 156 F. 2d 196, 197 (C.A. 8th), the court assimilated orders denying motions to vacate, amend or modify to orders denying motions for a new trial. As was said in *Wayne* v. *New York Life Ins. Co.,* 132 F. 2d 28 (C.A. 8th), by overruling the plaintiff's motion to vacate its final decision and entering a new one in its stead, the court merely reaffirmed the finality of the judgment as originally entered and plaintiff should have appealed from the judgment. Thus, in order for the petitioner to obtain on appeal the full relief which he sought by his motion it was necessary for him to have appealed not only from the judgment entered in favor of the United States, but from the judgment against Collector Earle, as well.

III

The decision of the Court of Appeals that the District Court did not have jurisdiction of the United States in the action to recover the $18,111.37 is questionable. That decision, however, was unnecessary, since, if the District Court did not have such jurisdiction, a judgment dismissing the suit against the United States on that ground could not form the basis for granting further relief to the petitioner against Collector Earle, any more than the judgment, which the District Court did enter, dismissing the suit against the United States on the merits. In this connection, it may be noted that the petitioner did not contend in the Court of Appeals, and does not contend here, that the District Court erred in concluding, on the merits of petitioner's claim, that he had failed to sustain the burden of proof. (R. 59).

In any event, there is no basis for the assumption, apparently made by petitioner, that the Court of Appeals held or would have held that the District Court could have rendered judgment against Collector Earle for this amount. To the contrary, the Court of Appeals held that it did not have jurisdiction to determine that question. Moreover, it is clear that Collector Earle was not liable for any amount greater than that for which judgment was rendered against him. Concededly he did not collect the $18,111.37 in question, and it has never come into his possession. This amount was paid to a former Collector and, though placed

in a suspense account, was actually deposited as an internal revenue collection to the credit of the Treasurer of the United States in the same manner as collections which are applied immediately to some account on the assessment list. See *Rosenman* v. *United States,* 323 U.S. 658, 660, and the same case below at 53 F. Supp. 722, 723 (C. Cls.). The application of the amount collected by the former Collector to the deficiency assessment was the act of the Commissioner, and not that of Collector Earle whose action in connection therewith was purely ministerial. In such circumstances, suit did not lie against Collector Earle for this amount. It is true that under the federal statutes the Collector is relieved from personal liability except in a case where the District Court is of the opinion that he acted without probable cause (*Sage* v. *United States, supra*), and that such suits against the Collector are commonly but a means of collecting the overpayment from the United States (*Moore Ice Cream Co.* v. *Rose,* 289 U.S. 373, 382). But no statute has enlarged the Collector's common law liability to include the item in question here; and his mere ministerial act of applying the amount in question to an assessment at the direction of the Commissioner could not subject him to personal liability. See *Lowe Bros. Co.* v. *United States,* 304 U.S. 302, 306.

CONCLUSION

The decision of the Court of Appeals that it had no jurisdiction to review the judgment entered against the Collector is clearly correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE UNITED STATES

RICHARD C. ROLES,

Petitioner

vs.

HUGH EARLE, COLLECTOR OF INTERNAL REVENUE for the DISTRICT OF OREGON, and THE UNITED STATES OF AMERICA,

Respondents

REPLY BRIEF IN SUPPORT OF WRIT OF CERTIORARI JURISDICTION

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Counsel for Petitioner

The government's answering brief requires an answer to three questions:

1. Should plaintiff's claim be treated as two separate actions each against a different party consolidated for trial, or

2. Should plaintiff's claim be treated as two separate actions severed for trial, each claim against both defendants, or

3. Should plaintiff's claim be treated as one single action against two defendants?

QUESTION 1

SHOULD PLAINTIFF'S CAUSE BE TREATED AS TWO SEPARATE ACTIONS EACH AGAINST A DIFFERENT PARTY?

The government's brief states on page 7 and 8 as follows:

> *"The theory of taxpayer's single action against Collector Earle then in office, and the United States was that recovery could be had against the collector for so much of the taxes in question as had been paid to him, namely* $6253.81, *and against the United States of the balance of* $18,111.37 *which had been collected by the prior collector, Maloney. See Powell vs. U. S., wherein it was held that a collector and the United States may be joined in one action for the recovery of taxes, but that a separate judgment should be entered against each. In any event, petitioner's demand for a jury trial required a severance."*

Hence, according to the theory now adopted by the government, plaintiff's claim should be treated as two separate causes (although involving identical facts). (1) A claim against the collector for $6253.81 and (2) a claim against the United States for $18,111.37.

Petitioner contends to the contrary as will be later discussed, but assumes for this argument that this is correct.

It is fundamental that jurisdiction may not be stipulated between counsel, or conferred by any theory or act of a party. No authority need be cited for that proposition.

If the claim against the United States was void under the case of *Roseman v. United States,* 323 U. S. 658, for lack of jurisdiction, and as determined by the 9th Circuit, since the former collector had received the money but not collected the tax, then a dismissal of that cause for lack of jurisdiction should be without prejudice as to plaintiff.

If the two claims were not only severed for trial purposes but were in fact two separate claims against different parties ($6253.81 against Collec-

tor and $18,111.37 against the United States), then it should appear obvious that plaintiff's claim in the amount of $6253.81 against the collector could not have any bearing on plaintiff's claim of $18,111.37 as against the United States; and therefore, it is impossible to comprehend how an appeal from a cause where the claim was limited to $6253.81 could possibly allow the court to include $18,111.37 in a judgment where the demand was only for $6253.81.

We quote from the opinion

> *"Appellant's entire argument is bottomed upon the thesis that he should have judgment against the collector because no jurisdiction existed to sue the United States which amounts to a virtual abandonment of his appeal from his judgment dismissing the action as to the United States. Yet appellant endeavors to tie in the judgment of January 2, 1951 against the collector with the judgment of March 26, 1951 for the purpose of appeal without mentioning the January 2, 1951 judgment in his notice of appeal. Appellant assumes that his appeal from the order overruling his motion to set aside the March 26, 1951 and to enter judgment in his favor for the full amount of the claim against the collector brought the judgment of January 2, 1951 here for consideration. The appeal from the said order did not and could not serve such a purpose. The motion*

to amend the judgment of March 26, 1951 had no such force and effect as to cause the judgment of January 2, 1951 to merge with the March 26, 1951 judgment for purposes of appeal.

"While it may be fairly deduced from the attitude taken by appellant on his appeal that he has abandoned his contention that the trial court has jurisdiction to enter a judgment against the United States of America, and therefore we would perhaps be justified in affirming the March 26, 1951 judgment on that ground, however, because of the apparent confusion in the record, we deem it advisable to decide for ourselves the jurisdictional question which is before this Court by reason of the appeal from the March 26, 1951 judgment."

We now quote from page 10 of the government's answering brief:

> *"Thus in order for the petitioner to obtain on appeal the full relief which he sought by his motion, it was necessary for him to have appealed not only from the judgment entered in favor of the United States, but from the judgment against collector, Earle, as well."*

In other words, the government's position, and apparently the court's position, likewise, is that although these were two separate and distinct actions against different defendants in different amounts, yet by some method unknown to the law,

plaintiff could and should have appealed from a judgment in favor of plaintiff and against Collector Earle in order to bring before the appellate court an erroneous judgment against plaintiff and in favor of the United States on a different claim.

The only judgment that could have been rendered (adopting the government's theory of separate claims against different defendants) as to the claim of $18,111.37 was an order of dismissal for lack of jurisdiction as to the United States, and further directing that the findings of fact and conclusions of law be set aside and held for naught and the parties be restored to their former position in regard to that portion of the claim.

Under the theory of separate actions consolidated for trial, and particularly, where the government insists on the position that the action against the collector is personal, (See page 8 of answering brief.), there is no reason or rule of law requiring an appeal from an unconnected favorable judgment in order to bring before the appellate court an unfavorable ruling in favor of a different defendant.

QUESTION 2

SHOULD PLAINTIFF'S CLAIM BE TREATED AS TWO SEPARATE ACTIONS SEVERED FOR TRIAL, EACH CLAIM AGAINST BOTH DEFENDANTS?.

This is the theory which would be required by severance.

There can be no doubt that the plaintiff's claim, whether separated in two parts for trial or not, was dependent entirely on one set of facts requiring one determination.

The government claims a severance was made necessary by plaintiff's demand for a jury trial. (p 8 Government's brief.)

How could this be true when the Court has now held that the trial court did not have jurisdiction of any claims against the United States?

If a portion of plaintiff's claim was properly held to be a claim against the United States, then it is undisputed that the court could enter the findings, conclusions and judgment either in conformity with the jury verdict or to the contrary, since the statute deprives a plaintiff of a jury trial

in a claim against the United States for the recovery of taxes.

Conversely, however, if the plaintiff's entire claim was held to be a claim against the collector, (and it is now so held) then the trial would be entirely governed by plaintiff's demand for a trial by jury, and the court would be bound by the jury verdict, and no severance was either necessary or proper.

There is no room for dispute in that regard.

Question number one proceeds on the theory that there were two separate causes with separate and distinct defendants. (Plaintiff vs. Earle only for $6253.81 and Plaintiff vs. United States only for $18,111.37.)

Question number two, here discussed, proceeds on the theory of severance. The Circuit Court and counsel for the government have not distinguished between the two but are confusing and attempting to combine the two theories.

There can be no severance unless there was something to sever — in this case one cause of action severed into two causes of action. Where this

is done, it must be done by assuming that the two causes of action are brought by plaintiff against all of the defendants named in the action, thus (1) plaintiff v. Collector Earle and the United States as to $6253.81, and (2) plaintiff vs. Collector Earle and the United States as to $18,111.37.

If this is the correct treatment, then the judgment entered in first cause of action is not only correct but is a complete and correct determination of that claim in which collector Earle is held liable and defendant United States is discharged from liability and responsibility.

In the second cause of action, the Untied States is held responsible, but not liable because the judge did not agree with the jury, and collector Earle was discharged from liability and responsibility.

The second judgment therefore is a determination (although erroneous) that the United States and not Collector Earle is the responsible party.

When plaintiff has sued one of two joint defendants, only one of which is responsible, and the Court gives judgment in favor of the United States, and discharges the Collector while the proper holding is exactly the opposite; namely, that

the United States should be discharged of responsibility for lack of jurisdiction, and the Collector should be held liable, then certainly, an appeal from that judgment will bring before the appellate court the question of a proper judgment against whichever defendant is responsible.

The appellate court has apparently confused plaintiff's position regarding the appeal from the order overruling plaintiff's motion to set aside and for entry of the proper judgment.

This motion was necessary to bring the matter to the trial court's attention but is completely unnecessary to the proper determination under the theory of severance. The confusion resulted from the government's answering brief on appeal.

If the judgment entered on the severed cause was a judgment on a cause where both the United States and the Collector were parties, the appellate court could enter the proper judgment on appeal against the proper party to that appeal, and both defendants were named in plaintiff's Notice of Appeal (R. 70).

The appeal from the order on the motion to set aside whether appealable or not is unnecessary

to a proper determination of the appeal because the action against the Collector and the United States for $18,111.37 is a separate and complete cause and where all of the facts are undisputed and a jury verdict has been received, there is nothing to do but reverse with directions to enter judgment against the proper party, under this treatment of plaintiff's total claim.

QUESTION 3

SHOULD PLAINTIFF'S CLAIM BE TREATED AS ONE SINGLE ACTION AGAINST TWO DEFENDANTS?

Plaintiff-petitioner believes that this is the only proper treatment of plaintiff's claim.

The facts are identical as to all of the elements of plaintiff's claim; the amounts are undisputed; and plaintiff's claim is all against one party (defendant-collector Earle). While the government makes a mild attempt to question the validity of the Circuit Court's holding in the latter respect, that court's decision is well-supported by the holdings of this court.

Petitioner has shown that if the claim is to be treated as two separate claims, one against the col-

lector and one against the United States (Question 1) that the judgment in favor of plaintiff could have no bearing on the second, and an appeal from the first judgment would be improper and would bring nothing before the appellate court. Likewise, petitioner has shown that if the claim is to be treated as two separate claims each against the two defendants Collector and the United States, then it would not be necessary to appeal from the favorable judgment since both parties were before the court on appeal from the second judgment.

Hence, while plaintiff feels that there simply could not have been a severance since the court had no jurisdiction over a claim against the United States, still the appellate court had the parties and all of the facts before it under either the second or third theory and hence, should have entered the proper judgment in any event.

It seems more logical, however, to follow the court's opinion in *Moore Ice Cream Co. vs. Rose,* 289 US 373, and hold that plaintiff's entire cause of action was against the government through collector Earle, and there was not and could not be a severance, since even if the parties had intended

to stipulate to jurisdiction of the District Court over the claim against the United States, and indeed the plaintiff did not* that such stipulation was a nullity and no act of the parties could have conferred jurisdiction over the United States.

Jurisdiction may never be conferred by any voluntary or involuntary act of the parties.

Under *Moore Ice Cream Co. v. Rose* (supra), this court held that the distinction between the collector and the United States was purely fictional. We quote from that decision:

---

*Note: The plaintiff at the time he filed his cause, as well as the government, had a question as to jurisdiction against the collector, and hence joined the United States as a party feeling that the jurisdictional question could be later resolved. The case of *Powell vs. U.S.* 123 F. 2d 472 has never been relied upon by petitioner, except for its holding as to Title 28, Section 1346.

When the matter came on for jury trial, Mr. Garland, representing the government, requested that the pre-trial order recite that as to the claim against the United States, it was agreed that it be tried by the court. Petitioner's counsel agreed that if any part of petitioner's claim was a claim against the United States, rather than the collector, that it would be tried by the court since the statute so required. Mr. Garland, counsel for the government, stated that he wanted the stipulation in the pre-trial order so that the government could not have been considered to have waived its right to trial by the court in the event the jurisdictional question should be argued.

This, of course, did not work a severance unless and until it was found to actually be a claim against the United States and not the Collector.

As a result of the jury trial, both the government and the plaintiff took no further steps to determine the jurisdictional question.

Mr. Winter representing the government at the time of the oral argument on a motion stated to the court:

> "*As your honor will recall we were going to raise a jurisdictional question. There was considerable doubt in the minds of both counsel for the government — and still is — and counsel for plaintiff as to the jurisdiction of the court in the matter, and there we entered into*

"A suit against the Collector who has collected a tax in fulfillment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he is guilty of no wrong, and though another is to pay; there may have been utility in such a device when the government was not suable as freely as now. They have little utility today, at all events where the complaint against the officer shows upon its face that in the process of collecting, he was acting in the line of duty, and in the line of duty he has turned the money over. In such circumstances, his presence as a defendant is merely a remedial expedient for bringing the government into court."

In view of that holding, the plaintiff in truth and in fact had only one single cause of action

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a stipulation. As I recall it was an oral stipulation to the effect that the evidence in both cases should be used by the court and considered as evidence is both cases." (R. 197)

This statement shows the true situation concerning the jurisdictional question, except that the statement is incorrect in that there was no stipulation in the present case. In the Bronson case the stipulation was entered into for a trial to the court at the time is was assigned for trial. In the present case there was no such stipulation. The Bronson case was a companion case before the same judge. Hence plaintiff's demand for a trial by jury of all issues triable by jury (R. 30).

It is likewise fundamental that the parties could not in any event stipulate jurisdiction as to the United States and that any order or judgment as to the United States was a nullity for lack of jurisdiction even if the stipulation had actually intended to confer jurisdiction on the District Court. Plaintiff never waived his demand for jury trial nor has he ever changed his theory.

against the government. Although the Collector and the United States were both named as defendants, the only question being whether plaintiff had the right to trial by jury. If so his entire claim was determined by the jury verdict.

The court then could have no basis on which to require an appeal from the favorable judgment against the collector as distinguished from the unfavorable judgment against the United States.

It was only the unfavorable judgment which was erroneous; there was no need under this or any other theory to appeal from a correct and favorable judgment, indeed it would have been improper so to do.

If plaintiff's claim was one cause of action, no judgment could have been appealed from until plaintiff's entire cause was disposed of. (Civil Rules of Procedure, Rule 54(B)). There would be no final judgment from which an appeal could be taken, since the second judgment was a nullity, being void for lack of jurisdiction.

If plaintiff had only one cause of action, parts of which was erroneously entered without jurisdiction, it is the court's and not plaintiff's act, where

the error was called to the court's attention prior to entry of the void judgment.

The facts having been determined, plaintiff is entitled to a correct judgment against the sole responsible defendant.

CONCLUSION

We note that the government contends that plaintiff should be permanently precluded from a determination as to the major portion of his claim.

They state on page 10 of their brief that plaintiff should have appealed from his favorable judgment. The time, however, having expired for this action, this plaintiff would be precluded from that course.

Thus, the government's theory is that while the proper parties were before the court and the facts are undisputed, the plaintiff is barred from ever having a determination of $18,111.37 of his claim.

We do not believe his is due process nor do we believe this is the usual course of judicial procedure.

We resolutely state it would not be justice.

The government infers on page 12 of their brief that collector Earle would not be liable for the $18,111.37 of plaintiff's claim even if the cause were reversed (although the appellate courts infers to the contrary) basing their contention on the fact that the application by the collector of $18,111.37 under direction of the commissioner does not subject the collector to personal liability.

They cite *Lowe Bros. Co. v. United States,* 304 U. S. 302 in support thereof.

In the government answering brief on appeal the cases was discussed by them in direct opposition to their present contention as follows: (p. 44 Appellee's brief).

> *"And this brings us to a consideration of Section 3-772 (e) referred to in footnote 4, supra, as also in the footnote on page 23 of the taxpayer's brief."*
>
> *Section 3772 (e) was added to the code by Section 9 (b) of the act of August 27, 1949, c 517, 63 Stat 666, known as the Tax administration Act of 1949. It provides that:*
>
> *(E) Credit treated as overpayment — The credit of an overpayment of any tax in satisfaction of any tax liability shall for the purpose of any suit for refund of such tax liability so satisfied, be deemed a payment in respect*

of such tax liability to the collector in office at the time such credit is allowed.

The committee reports do not adequately explain the reason for the amendment. It seems clear, however, that thereby the jurisdiction of the District Courts against collectors in office has been enlarged in a case where a credit of an overpayment of any tax has been made by the commissioner against another tax, whether for the same or another year.

Thus the doctrine of Lowe Bros. Co. vs. United States, supra, is no longer applicable in that situation. A suit for the recovery of an overpayment, which has been credited against another tax, may now be maintained against the collector in office at the time the collection is made, under this statute, even though it is not maintainable against him at common law."

The government's theory on the appeal was that even though the statute was applicable, that there was no overpayment (p. 52 of appellee's brief).

We cited to the appellate court and cite here again Section 3770 (c):

"An amount paid as a tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid."

The government then discussed the various holdings of various courts as to the effect of this section as follows:

"This amendment of the code was made necessary because the withholding provisions of the act required payment of substantially the entire tax before assessment. The committee reports explains that the interest cases (cited later by the Supreme Court in the Rosemank case) were not affected thereby. See S. Rep. No. 221, 78th Cong., 1st Sess., p. 34 (1943 Ann. Bull 1314, 133901340), 11 Conference Rep. No. 510, 78th Cong., 1st Sess., 448 (1943 Cum. Ball 1551, 1366).

"In the Rosemann case the Supreme Court said (p. 663) that it need not consider the effect of this amendment.

"Since then, various views have been taken by the lower federal courts of its effect. The District Court of the Southern District of Californai has twice held that it was merely declatory of existing law Murphy vs. United States, 78 F. Supp. 234, 240 and Mitchell v. Westover, 90 F. Supp. 278, 279. Moreover, the District Court of the Southern District of New York has likewise so held on the authority of the Murphy case, supra. Manee vs. United States, 97 F. Supp. 993, 995. See also United States vs. Goldstein, 189 F. 2nd 952, 755 (C A. 1). On the other hand the court of claims has taken the view that the amendment demonstrates the correctiveness of its views in the Rosemann case (citing) see Hanley vs. United States, 73 F. Supp. 80 (C. Cls.) and Reading Co. vs United States, 98 F. Supp. 598, 600 (C. Cls.)."

From the above it would seem under any theory that section 3772 (e) provides that a collector who

is in office when the overpayment is credited can be sued as though he had physically collected the money, and section 3770 (c) provides that there may be an over-payment even though there was no tax liability existent when the money was paid.

We see no reason to put strained or artifical construction on these sections. The intent seems obvious and the government admits the doctrine of *Lowe Bros. Co. vs. United States* is no longer applicable in their brief on appeal, yet in their opposition brief filed here (p. 12) they infer to the contrary in an apparent attempt to justify their present position.

Plaintiff submits that the writ should issue on the grounds:

1. That the lower courts have so far departed from the usual course of judicial process as to call for this court's powers of supervision.

2. That the appellate court has failed to follow the mandate of this court in the case of *Moore Ice Cream Co. v. Rose,* (supra).

3. That there is a conflict in the decisions between the 9th Circuit Court and the 2nd Circuit in

that the 2nd Circuit has held that a judgment is not final for appeal purposes until the whole of the matter is determined, while the 9th Circuit has held in this case that although only $6253.81 of plaintiff's entire claim has been determined, it was a final judgment from which plaintiff was required to appeal, failing which, he is without remedy.

The two cases

Clark vs. Taylor, 163 F. 2d 940;
Roles vs. Earle, 195 F. 2d 346.

4. That the Circuit Court of appeals for the Ninth Circuit has decided an important question of Federal law which has not been but should be, settled by this court, by construing Section 3772 (e), 63 Stat. 666 to mean that a suit against a collector may be maintained even though it has not physically collected the tax money but merely applied a credit.

Note — it does not appear to petitioner that this construction was necessary to the appellate court, determination of this case, but since the question was raised in the appellate briefs and in this matter, by the government, this ground is added.

It does appear that the 9th Circuit has inferentially determined this matter, however, by its discussion and determination of the lack of jurisdiction over the United States, otherwise the jurisdictional question would have been unimportant.

The 9th Circuit was apparently unsure of its position when it states in its opinion:

> *"However because of the apparent confusion in the record, we deem it advisable to decide for ourselves the jurisdictional question which is before this court by reason of the appeal from the March 26, 1951 judgment."*

Thus it appears that if the 9th Circuit had not taken the position that it was necessary to have appealed from the January Judgment, it would have allowed the additional claim for $18,111.37.

In this conclusion the government now in this brief disagrees (although they apparently contended to the contrary on appeal).

The interpretation in the District Court has not been uniform, and should be settled by this court.

This determination is important to settle the practice as to the selection of the proper defendant in all tax matters affecting application of credits

to tax liability and questions as to the running of interest.

Although the matter is not directly determined in this case it will undoubtedly be necessary to a final determination.

Note: (R 64-70) was agreeably deleted in the Circuit Court Record. Its inclusion was erroneous by the certifying clerk.

Respectfully submitted,

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